

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-1760

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

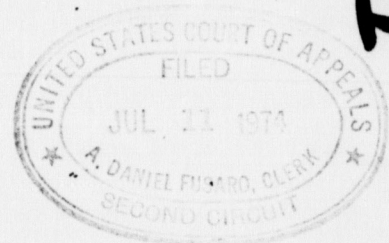
UNITED STATES OF AMERICA,

Appellee,

-against-

EDWARD PRAVATO,

Appellant.



Docket No. 74-1760

P/S

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
606 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
Of Counsel

3/

PAGINATION AS IN ORIGINAL COPY

DATE	PROCEEDINGS
3-18-74	Before NEAHER, J - case called - hearing on motion to suppress ordered and begun - Hearing held and concluded - hearing motion to suppress photo denied - Hearing on motion to suppress - hearing ordered and begun - hearing held and concluded - Decision Reserved.
3-19-74	Before NEAHER, J - case called - hearing resumed - deft Polisi's motion to suppress - motion denied - Govts motion to dismiss count 3- Granted -trial contd to March 20, 1974.
3-20-74	Before NEAHER, J.- Case called- Defts and counsel present- Trial resumed Jurors selected and sworn-Trial contd to 3-21-74
3-21-74	Before NEAHER, J.- Case called- Defts and counsel present-Trial resumed Each deft moves to dismiss and for a directed verdict - Motion denied-Each deft rests-Both sides rest-Trial contd to 3-22-74
3-22-74	Before NEAHER, J - case called - trial resumed - Jury returned at 6:05 PM and rendered its verdict of guilty on counts 1 and 2 as to both defts - jury polled and jury discharged - sentences adjd without date - bail contd as to deft Polisi- deft Pravato in custody.
3-22-74	By Neaheer, J - Order of Sustenance filed (14 persons)
3-26-74	Writ ret'd and filed - executed (PRAVATO)
4-5-74	Stenographers Transcript dated 3-18-74, 3-19-74, 3-20-74, 3-21-74 and 3-22-74 filed
4-22-74	Voucher for Expert Services filed (PRAVATO)
5/24/74	Petition for writ of habeas corpus Ad Prosequendum filed.
5/24/74	By NEAHER, J.- Writ issued, ret. 5/31/74.
5-31-74	Before NEAHER, J.- Case called- Defts and counsel present- Deft POLISI sentenced to study and report pursuant to T-18, U.S.C. Sec. 4208(b)- Execution of sentence stayed until 6-3-74 at 10:00 A.M.- Deft PRAVATO sentenced to imprisonment for a period of 20 years on count 1 and 20 years on count 2 pursuant to T-18, U.S.C. Sec. 4208(a)(2)- sentenced to run concurrently and to run concurrently with sentence deft is now serving- Clerk to file a notice of appeal without fee
5-31-74	Judgment and Commitment filed- certified copies to Marshal (POLISE)
5-31-74	Judgment and Commitment filed- certified copies to Marshal (PRAVATO)
5-31-74	Notice of appeal without fee filed (PRAVATO) Financial affidavit filed
5-31-74	Docket entries and duplicate of notice of appeal mailed to court of appeal (PRAVATO)
6-3-74	Writ ret'd and filed- executed (PRAVATO)
6-5-74	Certified copy of Judgment and Commitment ret'd and filed- deft delivered to Federal Detention Headquarters (PRAVATO)

72 CR 390

NEAHER, J.

[illegible]

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		5-31-74	Notice of appeal (No fee)		
Clerk,			(PRAVATO)		
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
4-4-72	Before TRAVIA, J. - Indictment filed.
4-10-72	By TRAVIA, J. - Petition for Writ of Habeas Corpus Ad Prosequendum as to deft EDWARD PRAVATO filed / issued.
2-0-1972	BEFORE TRAVIA, J., Judge Jackson - Defts & counsels present - court assigns Edward Kelly of Legal Aid as counsel for deft Provato -
	Order signed - Defts waive reading of Indictment and each enters a plea of not guilty - Bail continued as to deft Polisi and \$5,000 personal bond for deft Pravato - 30 days for Motions -
4-20-72	Writ returned and filed - Executed (Pravato)
4-20-72	By Travia J - Order appointing counsel filed (Pravato)
4-20-4 72	Notice of Appearance filed (deft Polisi)
5-11-72	Government's notice of readiness for trial filed.
5-12-72	Files 71M1191 and 72M614 inserted into criminal file.

72 CR--390

CRIMINAL DOCKET

DATE	PROCEEDINGS
5-30-73	Petition for Writ of Habeas Corpus Ad Prosequendum filed (Pravato)
5-30-73	By Neaher, J - Writ Issued ret. June 8, 1973 (Pravato)
6/1/73	Before NEAHER, J.- Case called- Deft POLISI and counsel present-Adjd to Sept. 10, 1973.
6/11/73	Writ ret'd and filed. Unexecuted. (PRAVATO)
8-31-74	Deft's motion to dismiss the indictment filed (PRAVATO)
8/31/73	Notice of motion filed, re: failure to afford speedy trial (PRAVATO) returnable 9/10/73
9-6-73	Petition for Writ of Habeas Corpus Ad Prosequendum filed (Pravato)
9-6-73	By WEINSTEIN J - Writ Issued, ret. 9-10-73 (Pravato)
9-10-73	Before NEAHER, J - Case called - adjd to 9-24-73 for Trial.
	Motion by defts for suppression and for dismissal of the
	Indictment adjd to 9-24-73 at 10:00 am.
9-20-73	BY NEAHER, J - Order filed that the deft be examined by Dr. Martin Lubin, df Booth Memorial Hospital, Flushing, N.Y. at the Federal House of Detention, as to his mental condition, etc.
9-21-73	Govts affidavit in opposition to defts motion for a speedy trial (EDWARD PRAVATO)
9-24-73	Writ read and filed - executed (Pravato)
9-24-73	Before Neaher, J - Case called - adjd to Oct. 23, 1973.
10-23-73	Before NEAHER, J - Case called on motion to suppress and for certain records, etc. adjd to Nov. 2, 1973 at 10:00 am for report.
11-5-73	Stenographers transcript filed dated Jan. 22, 1973.
11-7-73	2 Stenographers transcripts filed dated Dec. 11, 1972 and Feb. 16, 1973 respectively.
11/8/73	Stenographers Transcript dated 2/20/73 and 6/12/72 filed
1/2/74	Stenographer's transcript of 10/23/73 filed
1-16-74	By NEAHER, J - Memorandum and Order filed denying motion to dismiss the Indictment. The case is hereby placed on 72 hours call status for trial. (EDWARD PRAVATO)
1-29-74	Before NEAHER, J - case called - set for Trial March 11, 1974.
2-20-74	Petition for Writ of Habeas Corpus Ad Prosequendum filed (PRAVATO)
2-20-74	By NEAHER, J - Writ Issued, ret. March 11, 1974 (PRAVATO)
3-11-74	Notif. of renewal of motion to dismiss filed (PRAVATO)
3-11-74	Before NEAHER, J.- Case called- Respectfully referred to Judge Mishler
3-11-74	Before NEAHER, J - case called - defts & counsels present - adjd to Mar. 13, 1974 for motion to suppress.

72CR 390

DATE	PROCEEDINGS
5-18-72	Before NEAHER, J - Case called - Pre Trial conference held and continued to June 14, 1972.
5-30-72	Notice of Motion filed, ret. June 9, 1972, for an order to have the New York State Dept. of Correctional Services send a copy of defts complete medical and psychiatric file to defense counsel.
6-9-72	Before NEAHER, J. - Case called & adjourned to 6-12-72.
6-12-72	Before NEAHER, J - Case called on defts motion for copy of medical file to defense counsel etc. No opposition - motion granted (see Order on back of motion papers)
6-12-72	By NEAHER, J - Order filed granting motion Motion granted - Order to be submitted.
6-13-72	By NEAHER, J - Order filed that the New York State Dept. of Correctional Services send a copy of the complete medical and psychiatric file of deft PROVATO to the offices of the Legal Aid Society, defense counsel in the aboe case, etc. (copy to Legal Aid)
6-16-72	Before NEAHER, J - Case called - Pre Trial conference held and continued to June 29, 1972.
6-29-72	Before NEAHER, J. - Case called. Pre-trial conference held & continued to October 4, 1972.
6-30-72	By NEAHER, J - Order filed that deft PROVATO be committed to the Medical Center for Federal Prisoners at Springfield, Mo. to be examined as to his present mental condition by at least one qualified psychiatrist not to exceed 60 days and that a report be rendered to J. Neaher and when such examination shall have been completed the deft, if sane, shall be returned to the custody of the U.S. Marshal, etc. (T-18:4244)
9-28-72	Petition for Writ of Habeas Corpus Ad ^{Testificandum} Prosequendum filed (Christopher)
9-28-72	By NEAHER, J - Writ Issued, ret. Oct. 16, 1972. (Christopher)
10-17-72	Writ ret'd and filed - Executed.
12/11/72	Before NEAHER, J. - Case called - Set down for trial 1/22/73 at 2:00 P.M.
12-26-72	Psychiatric report filed re deft Provato received from Chambers of J. Neaher with reply dated Dec. 22, 1972 from Judge Neaher to Hon. Robert Morse and Simon Chrein of Legal Aid Society.
1-22-73	Before Neaher, J - Case called - adj'd to Feb. 16, 1973.
2/16/73	Before NEAHER, J. - Case called - Adj'd to 2/20/73.
2/20/73	Before NEAHER, J. - Case called - Trial set for 3/5/73.
2/27/73	Petition for Writ of Habeas Corpus Ad Prosequendum filed.
2/27/73	By NEAHER, J. - Writ issued, ret. 3/1/73.
5-10-73	Notice of Motion filed for suppressing evidence (ret. June 11, 1973 - Pravato)

72 CR 390
CRIMINAL DOCKET

[illegible]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA

-against-

EDWARD PRAVATO and
SALVATORE POLISI,

Defendants.
----- X

THE GRAND JURY CHARGES:

72CR 390

INDICTMENT

Cr. No.
(T. 18 USC §2113(a)(d)
T. 18 USC. §371 and §2)

FILED

IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ APR 1972 ★

TIME A.M.
P.M.

COUNT ONE

On or about the 3rd day of May 1971, within the Eastern District of New York, the defendants EDWARD PRAVATO and SALVATORE POLISI knowingly and wilfully, by force, violence and intimidation did take from the person and presence of employees of the Franklin National Bank, 249-46 Horace Harding Boulevard, Queens, New York, approximately Twenty Five Thousand One Hundred Thirty Five Dollars and Twelve Cents (\$25,135.12), in United States currency, which money was in the care, custody, control, management and possession of the said Franklin National Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18 United States Code §2113(a) and §2).

COUNT TWO

On or about the 3rd day of May 1971, within the Eastern District of New York, the defendants EDWARD PRAVATO and SALVATORE POLISI, knowingly and wilfully, by force, violence, and intimidation did take from the person and presence of employees of the Franklin National Bank, 249-46 Horace Harding Boulevard, Queens, New York, approximately Twenty Five Thousand One Hundred Thirty Five Dollars and Twelve Cents (\$25,135.12) in United States currency, which money was in the care, custody, control, management and

possession of the said Franklin National Bank the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendants EDWARD PRAVATO and SALVATORE POLISI did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18 United States Code §2113(d).)

COUNT THREE

On or about and between the 1st day of May 1971, and the 3rd day of May 1971, both dates being approximate and inclusive, within the Eastern District of New York, the defendants EDWARD PRAVATO and SALVATORE POLISI did knowingly and wilfully conspire to commit an offense against the United States, in violation of Title 18 United States Code §2113(a)(d) and §2, by conspiring to take from the person and presence of employees of the Franklin National Bank, 249-46 Horace Harding Boulevard, Queens, New York monies and things of value, which monies and things of value were in the care, custody, control, management and possession of the said Franklin National Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendants did conspire to assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18 United States Code §371).

In furtherance of the said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendants EDWARD PRAVATO and SALVATORE POLISI committed the following

O V E R T A C T S

1. The Grand Jury repeats and realleges each and every

3/19/71 -
Sent
with -
drawals
this
Court.
EM
(SD)

- 3 -

allegation contained in Counts One and Two as if more fully
set forth herein.

A TRUE BILL.

Samuel Chisholm
FOREMAN.

Robert A. Murphy
UNITED STATES ATTORNEY

THE COURT'S CHARGE TO THE JURY

Members of the Jury, you are now about to undertake your final function as jurors. Your duty is a serious and important one. In performing it you share with the Court the responsibility of administering justice according to law. Your oath as jurors obliges you to discharge this final task in an attitude of complete fairness and impartiality, and, as was emphasized by me when you were selected as jurors, without bias or prejudice for or against the Government or the defendants as parties to this controversy.

The case is important to the Government, since the enforcement of the criminal laws is required in the public interest. Obviously it is equally important to the defendants, who are charged with a serious crime and have the right to receive a fair trial. The community has an interest in that, too.

5

Let me add the fact that the Government is a party entitles it to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All parties, Government and individuals alike, stand as equals before the bar of justice.

Your final role is to decide and pass upon the fact issues in the case. You are the sole and exclusive judges of the fact. You determine the weight of evidence. You appraise the credibility of the witnesses. You draw the reasonable inferences from the evidence. You resolve such conflicts as there may be in the evidence.

I shall later refer to how you determine the credibility of witnesses. My final function is to instruct you as to the law. And it is your duty to accept these instructions as to the law and to apply them to the facts as you may find them.

With respect to any fact matter it is your recollection and yours alone that governs. As I have already told you, anything that counsel, either for the Government or the defense may

Charge of the Court

have said with respect to the matters in evidence, whether during the trial, in a question, in argument or in summation, is not to be substituted for your own recollection of the evidence. So too, anything the Court may have said during the trial or may refer to during the course of these instructions as to any matter in evidence is not to be taken in lieu of your own recollection.

There are certain principles of law which apply in every criminal case, and to which I made reference and emphasized at the time of your selection as jurors. I repeat them to you now:

The indictment is merely an accusation, a charge. It is no evidence or proof of a defendant's guilt. Each defendant on trial has pleaded not guilty. Thus the Government has the burden of proving the charges against each defendant beyond a reasonable doubt. They do not have to prove their innocence. On the contrary, they are presumed to be innocent of the accusation contained in the indictment. This presumption of innocence was in their favor at

Charge of the Court

the start of the trial, continued in their favor throughout the entire trial, is in their favor even as I instruct you now, and remains in their favor during the course of your deliberations in the jury room. It is removed only if and when you are satisfied the Government has sustained its burden of proving the guilt of each defendant beyond a reasonable doubt.

The question that naturally comes up is what is a reasonable doubt? The words almost define themselves, that there is a doubt founded in reason and arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence. Reasonable doubt is a doubt which appeals to your reason, your judgment, your common sense and your experience. It is not caprice, whim, speculation, conjecture or suspicion. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can candidly and honestly

Charge of the Court

say you are not satisfied of the guilt of a defendant, that you do not have an abiding conviction of this guilt, in sum, if you have such a doubt as would cause you as a prudent persons to hesitate before acting in matters of importance to yourselves, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.

On the other hand, if after such a fair and impartial consideration of all the evidence you can candidly and honestly say you do have an abiding conviction of a defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt, and in such circumstances it is your duty to convict.

One final word on this subject: Reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule few persons, however guilty they might be, would be convicted.

It is practically impossible for a person

to be absolutely and completely convinced of of any controverted fact which by its nature is not susceptible of mathematical certainty. In consequence the law in a criminal case is that it is sufficient if the guilt of a defendant is established beyond a reasonable doubt, not beyond all possible doubt.

Against that general background we turn to a consideration of the charges against the defendants. The defendants are charged with two violations of the Federal Bank Robbery Act. As I mentioned previously, the third count in the indictment, which charges a conspiracy to violate the act, is no longer before you and requires no further consideration. Under count one of the indictment the defendants are charged with having violated Title 18, United States Code, Section 2113A. That's the Bank Robbery Act, which in pertinent part provides, and I quote: "Whoever by force and violence or by intimidation takes from the person or presence of another, any money belonging to or in the care, custody, control, management or possession of any bank, shall be

guilty of a crime."

Under Count two the defendants are charged with violating Title 18, United States Code, Section 2113 (d), which provides, and I quote: "Whoever in committing any offense defined in sub-section (a) of this section, (namely a bank robbery,) assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device is guilty of a crime."

Next with each of these two bank robbery charges another Federal law known as the Aiding and Abetting Statute, Title 18, United States Code, Section 2, comes into play. This law provides, and I quote: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal."

Now, let us turn to the indictment, which I am going to read to you as it now stands. Count one: "On or about the third day of May, 1971 within the Eastern District of New York, the defendants Edward Pravato and Salvatore Polisi knowingly and willfully by force, violence and intimidation, did take from the person and presence

Charge of the Court

of employees of the Franklin National Bank, 249-46 Horace Harding Boulevard, Queens, New York, approximately \$25,135.12 in United States currency, which money was in the care, custody, control, management and possession of the said Franklin National Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation."

(Continued on the next page.)

Now, --- Count 2 reads in virtually the same language, except that it adds "And in commission of this act and offense the defendants Edward Pravato and Salvatore Polisi did assault and place in jeopardy the lives of the said bank employees as well as the lives of other persons present by the use of a dangerous weapon."

Now, under Count 1 in order to sustain the charge against these defendants, the Government must establish beyond a reasonable doubt as to each defendant the following essential elements:

One, that on or about May 3rd, 1971 the Franklin National Bank was a bank the deposits of which were insured by the Federal Deposit Insurance Company.

There is no dispute in evidence of that. It has been stipulated to by the defense that that is so. However since it is an essential element, you must find beyond a reasonable doubt that this is so.

Two, that on or about that date -- that is May 3, 1971 -- the defendants took money which belonged to or was in the care, custody, control, management or possession of that bank.

Three, that the money was taken from the

person or presence of one or more persons other than the defendants, namely, employees in the bank.

And four, that the persons who accomplished this taking -- that is when I say persons here, that means these defendants on trial; this is an essential element the Government must prove beyond a reasonable doubt -- now, that these defendants accomplished this taking, did so by force and violence or by intimidation.

Now, force, violence and intimidation are used in their ordinary sense, and I assume you all understand what those words mean.

In order to sustain the charge under the second count the Government in addition to the essential elements required to establish the crime of bank robbery under the first count must prove beyond a reasonable doubt as to each defendant an additional element: That is, that the defendants assaulted a person or put a person's life in jeopardy by the use of a dangerous weapon.

Assault means an unlawful threat to do physical harm to another, causing a present fear of immediate harm. To put a person in jeopardy, however, is not only to make him fear that he will be injured

or killed but also to expose him to a serious risk of danger that he will be in by the use of a dangerous weapon.

To support this element the Government has offered testimony that a hand gun was carried by one of the bank robbers who entered the bank, and that while he was there he pointed it at one or more of the bank employees. It is not necessary for the Government to show that each defendant personally committed every act constituting the crime. Where two or more persons are charged with the commission of a crime, the guilt of an accused may be established without proof that each defendant did every act constituting the offense.

You will recall I referred a moment ago to the aiding and abetting statutes, Title 18 United States Code Section 2, which I told you provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he himself committed it.

In order to aid and abet another to commit a crime, however, it is necessary that one knowingly associate himself with and further the venture, intending it to succeed, fully aware that the result will be

an offense against the laws of the United States.

For example if one man who entered the bank merely held the gun while the other man ran around and scooped up the money, each could be found guilty of armed robbery of the bank. In other words, if a person, fully aware of what he is doing, plays a significant role and facilitates an act prohibited by law, he is equally guilty with the person or persons who directly perform the illegal act or acts, even though the latter played a much greater or major part in the perpetration of the crime.

Now, in this case there appears to be no real dispute that the Franklin National Bank was robbed on May 3, 1971. As I said before, its deposits were insured by the Federal Deposit Insurance Company. And it is also stipulated, as I understand it, that a substantial sum, approximately \$25,000 which was in the bank's care and custody, was taken from employees of the bank by the use of force, violence and intimidation, and that at least three employees were put in jeopardy when a dangerous weapon was used with respect to them.

The basic controverted fact issue in this case is identity. That is, are the defendants

Edward Pravato and Salvatore Polisi the two who, as charged in the indictment, committed the acts referred to at the Franklin National Bank at Horace Harding Boulevard on May 3, 1971?

The hard core of this case is the issue of identification. The case stands or falls on it.

Since counsel for the Government and the defendants have reviewed in detail the evidence and emphasized their respective contentions, I will limit my comments to pointing out in rather broad terms the questions you will have to decide in order to reach a conclusion as to whether or not the Government has met its burden of proof as to either defendant on trial.

The Government relies here upon direct and circumstantial evidence on the issue of identity. Direct evidence is where a witness testifies to what he saw, heard or observed, what he knows of his own knowledge, something which comes to him by virtue of his senses.

Here the Government has presented the testimony of bank employees who were in the Franklin National Bank on May 3, 1971, three of whom identified the defendant Pravato in the courtroom as one of

the participants in the holdup, the man who according to them had the hand gun.

Mrs. Barth, one of the three employees, also identified the defendant Polisi in the courtroom as the other participant, the one who jumped over the counter, came to her teller's cage, seized the money from her cash drawer.

In addition to this direct evidence the Government also relies upon circumstantial evidence. Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably follow in the common experience of mankind.

Circumstantial evidence if believed is of no less value than direct evidence, for in either case you must be convinced beyond a reasonable doubt of the guilt of a defendant.

Thus the Government relies upon pictures, automatically taken by the bank surveillance camera of the persons who allegedly robbed the bank, and which the Government contends are the defendants on trial. These pictures, which were developed from a surveillance film which was activated during the holdup, are in evidence as Government's Exhibits 2A through 2Q and

3A through 3V.

In addition the Government relies upon an out-of-Court identification made by the witness Mrs. AlPert on the basis of her selection of the photograph of the defendant Polisi from a group of photographs shown her by FBI Agent Sweeney some eight months after the bank robbery.

The defendants in resisting the Government's case rely upon the presumption of innocence in their favor and attack the reliability of the identifications made by the bank employees, stressing the short span of time involved, the employees' fear and distress, and the limited opportunity they had for observation when they were lying on the floor behind the counter.

In particular the defendants contend that inconsistencies in the descriptions they gave at the time of the robbery demonstrate that their recollection of the features of the defendants on trial is derived from viewing photographs of the defendants and not from independent observation at the time of the offense.

Now, the identification of persons accused of crimes through the use of photographs is a procedure widely and effectively employed in criminal law enforcement. But a mistaken photograph identification

can occur, however, as a result of honest error.

So that even when investigating officers follow the most correct photographic identification procedures, there is always some danger that a witness may make an incorrect identification.

You will have to determine in light of the totality of the circumstances -- that is all the evidence -- whether the bank witnesses who testified here had sufficient opportunity to view the robbers at the time of the crime, their degree of attention at the time, the accuracy of their contemporaneous description of the robbers, prior to viewing photographs of the defendants on trial, the degree of certainty demonstrated by each witness in making the identification, and the length of time between the crime and the first identification made.

In short you will have to decide whether their identification of these defendants is derived from past recollections actually retained in memory, or are the result of being influenced by photographs of persons suspected of committing the robbery, which included those of the defendants on trial.

The law does not require that the identification of a defendant charged with a crime be positive beyond

any shadow of a doubt. It does require that identification be established beyond a reasonable doubt. The sufficiency of the evidence of identification is for you, the members of the jury, to determine.

I have not adverted to all the evidence upon which the Government and the defendants rely to support their respective contentions. All evidence, whether or not I have referred to it, or counsel have mentioned it in their summations, is important and must be considered by you.

In my outline of the testimony I have sought to state the substance thereof with complete accuracy. However if perchance any reference to testimony does not agree with your recollection -- and I've stated this before -- you are to disregard such references by me. And I emphasize this as strongly as words can convey meaning. Always it is your recollection, and yours alone, that governs, and you must unhesitatingly reject any statement as to a fact which I have made which does not accord with your own recollection.

Now, it must be apparent to you that the contentions of the Government and defense are in sharp diversion on key points, and that critical issues

of fact and credibility are created. You are called upon to decide the fact issues here. How do you determine where the truth lies? Now, I think you understand why at the start of the trial I suggested it would be desirable and important for you not only to listen but to look at the witnesses as they testified. Your determination of the issue of credibility largely must depend on the impression that a witness made upon you as to whether or not he was telling the truth or giving you an accurate version of what occurred.

I often say to jurors when you walk in the door of the courtroom and sit in the jury box, while the trial is going on, and when you are deliberating in the jury room, you have your common sense, your good judgment and your experience with you. You decide whether or not a witness was straightforward and truthful, whether he attempted to conceal anything, whether he has a motive to testify falsely, whether there is any reason why he might color his testimony.

In other words, what you are trying to do is to size a person up, just as you would do, as I said before, in any important matter where you were undertaking to determine whether or not a person is

truthful, candid and straightforward.

In passing upon the credibility of a witness you must also take into account inconsistencies or contradictions as to material matters in his own testimony, or any conflict with that of another witness.

A witness however may be inaccurate contradictory or even untruthful in some respects, and yet be entirely credible in the essentials of his testimony. The ultimate question for you to decide in passing upon credibility is did the witness tell the truth here before you as to essential matters.

The fact that some Government witnesses were Government employees does not entitle their testimony to any greater weight of consideration than that afforded to any other witness in the case. You will evaluate their credibility the same way you do that of any other witness.

(continued on next page)

If you find that any witness -- and this applies alike to Government and non-Government witnesses -- willfully testified falsely as to any material fact, you have a right to reject the testimony of that witness in its entirety, or you may accept that part or portion which commends itself to your belief as credible.

The defendants have not testified in this case. That is their absolute right, and in no respect may be considered by you as any evidence against them or as a basis for any presumption or inference unfavorable to them. You must not permit that fact to weight in the slightest degree against any of them, nor should it enter into your considerations or deliberations.

During the course of the trial the attorneys at various times have objected to certain questions have moved to strike answers and taken other procedural positions before you. These are matters of technical procedure that are the proper concern of the attorneys, and do not concern you. I instruct you that you are not to draw any inferences from the fact that attorneys have made objections and motions before you during the trial.

The guilt or innocence of the defendants on trial before you is for you and you alone to determine. The Government to prevail must prove the essential elements by the required degree of proof, as already explained in these instructions. If it succeeds your verdict should be guilty. If it fails it should be not guilty.

The case of each defendant must be considered separately, as if he alone were on trial, and you will render a separate verdict as to each. Moreover you must consider each count in the indictment separately, as if each were the sole charge against the defendant.

The verdicts in the instance of each count must be unanimous.

Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendants solely upon the basis of such evidence in light of these instructions. Under your oath as jurors, as I mentioned previously, you cannot allow a consideration of the sentence which may be imposed upon a defendant if he is convicted to enter into your deliberations or to influence your verdict in any way. Your duty is to decide the case solely

upon the evidence. In the event of a conviction the duty of imposing a sentence rests solely with the Court.

Each juror is entitled to his or her own opinion, but each should however exchange views with his fellow jurors. That is the very purpose of jury deliberation, to discuss and consider the evidence, to listen to the arguments of fellow jurors, to present your views to consult with one another and to reach an agreement based solely and wholly on the evidence, if you can do so without violence to your own individual judgment.

Each one must decide the case for himself or herself after consideration with his or her fellow jurors. But you should not hesitate to change an opinion which after discussion with your fellow jurors appears erroneous.

However if after carefully considering all of the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from others, you are not to yield your judgment simply because you are outnumbered or outweighed. Your final vote must reflect your conscientious view as to how the issue should be decided.

The charge here is most serious. The determination of this case is important to the public. It is equally important to these defendants. Under your oath as jurors, as I said before, you must decide the case without fear or favor and solely as I have stated any number of times, in accordance with the evidence and the law.

If the Government has failed to carry its burden as to a defendant, it is your sworn duty to acquit. If it has carried its burden as to a defendant, you must not shrink from your sworn duty, you must convict.

Now, as is the custom here, Juror No. 1 will be the foreman. After you retire the exhibits in the case will be sent in the jury room for your examination. If at any time you wish to communicate with the Court you will do so by written note through your foreman, who will deliver it to the Marshal who guards your jury room door against intrusion, and he will bring it to the courtroom, where we will convene counsel, and perhaps call you in again, if your request calls for something to be done.

You may, if you feel it necessary -- and I'm not suggesting that it is -- ask for portions of

testimony to be read to you, and indeed if any question is important enough in your mind to be asked, feel free to ask it. I will be here, counsel will be here, and we will endeavor to supply the answer.

And now I have one final duty which I approach with some reluctance: two alternates have been sitting here patiently throughout the trial, and the time has come when I must separate them from the rest of the jurors, because only twelve may deliberate on the case. You mustn't think it has been a waste of time, but, as I often say, you are like a good inflated rubber tire on a dark road at midnight should one tire go flat. So we have missing jurors from time to time, and it's been important that you be here, and I thank you and dismiss you at this time. So take your cards, and you may get your things from the jury room, and you will probably get your turn next time.

(The alternates left the courtroom.)

MR. COIRO: If your Honor please, may we approach the side bar?

THE COURT: Yes, all right, come up to the side bar.

(Discussion side bar.)

MR. COIRO: Judge, I have no requests, but I do have an exception to your Honor's charge.

THE COURT: What?

MR. COIRO: When your Honor marshalled the evidence you made reference to the fact that the Government relied on the in-court identification of Mrs. Barth and the out-of-court identification of a photograph by Mrs. Alpert, and you did not make reference to the fact that he was not -- that Polisi was not identified by Mrs. Calagari in the courtroom nor by Mrs. Alpert in the courtroom.

MR. KAPLAN: What? We know that. That's what the Judge said.

MR. COIRO: Wait a minute, the Judge did not say that.

MR. KAPLAN: He didn't say that, but it's obvious.

MR. COIRO: Right, but he said the Government relied on the in-court identification.

MR. KAPLAN: He doesn't have to say the negative, he only has to say what the Government relied on.

THE COURT: That's all right, your exception is noted. As I pointed out to you, I didn't advert,

I told them, to all the evidence in the case. If you feel that --

MR. COIRO: I would request your Honor to charge that, number one, defense relies on the fact that Polisi was not identified by Mrs. Calagari in court nor by Mrs. Albert in court.

MR. KAPLAN: I think your Honor gave them eminently fair and reasonable instruction on that point. You don't have to say the Government doesn't rely upon. You said what the defendant relied upon.

MR. COIRO: He didn't say.

THE COURT: I didn't say that.

MR. KAPLAN: Not directly, but indirectly, your Honor.

THE COURT: It is implicit --

MR. KAPLAN: It's implicit.

THE COURT: -- by not mentioning it. Of course I didn't want it to be productive of any --

MR. KAPLAN: It would be prejudicial at this time, your Honor.

MR. COIRO: Judge, I think it was most important, because you related the Government witness identified him in court, and didn't say anything about those that didn't identify him.

MR. KAPLAN: He doesn't have to say anything

about any that didn't identify.

MR. COIRO: He might have as far as the defense was concerned, but left it out.

THE COURT: I think I'm going to deny it. I will refuse your request and let you have an exception.

Now, is there anything else.

MR. KELLY: I have no exceptions.

MR. COIRO: Judge, you are going to kill me if you don't do that.

(End of discussion, side bar.)

THE COURT: All right, now, members of the jury, the time has come when you may now have unlimited discussion back there in the jury room.

(Marshall sworn by the Clerk of the Court.)

THE COURT: So would the Marshall take them, please.

(The jury left the courtroom.)

THE COURT: Now, what do you want to do about exhibits, and so forth?

MR. KAPLAN: Excuse me, your Honor?

THE COURT: What do you want to do about exhibits?

MR. KAPLAN: Leave them with Mr. Dunseith.

MR. COIRO: Judge, I have no objection to any exhibit that they want. You know, if the Marshall brings out a note for is it Mr. Dunseith, he can just

send them in. I have no objection.

THE COURT: All right, can we agree on that now?

MR. KELLY: That's fine, Judge. I don't see any need for us to come back.

THE COURT: So it won't be necessary for us to call you up here.

MR. COIRO: No, fine, Judge.

THE COURT: Let's see, what else could there be?

MR. KAPLAN: That's just the outside of the bank. I believe it was in evidence.

THE COURT: Was that one of that series, the first one, I something?

THE CLERK: This is 1E -- 1F.

MR. KAPLAN: I just want to make sure, because it's only marked for identification at this time, but my recollection was that this was --

THE CLERK: 1A to 1F, I thought they were all in.

MR. KAPLAN: I'm sure Mr. Coiro and Mr. Kelly have no objection. They were marked. I just want to call that to the Court's attention.

THE COURT: They were in evidence -- are in evidence.

MR. KAPLAN: But they were marked as such. One of them wasn't.

THE CLERK: D, E and F were marked, but the

others were separate. But they are all in.

THE COURT: Let's see what else, what else could there be? Is there anything else?

MR. KAPLAN: The stipulations and the telephone number and the pictures. That's all, Judge.

THE COURT: All right. Well, I guess I'll turn my attention to some other business.

MR. KAPLAN: Thank you, Judge.

MR. COIRO: Thank you, your Honor.

(Continued on next page)

JB fls.

PM (1)

THE COURT: My recollection is there were some FBI statements received in evidence. Or am I mistaken? Some were marked for identification, but I thought at least one went in. Did it or didn't it?

MR. KELLY: No. I don't think any went in evidence.

THE COURT: You don't think?

MR. KELLY: No.

THE CLERK: I only have three reports.

MR. KELLY: I think Mr. Coiro wanted to put one in.

THE COURT: You better get them back. Get them back in here because there is -- we will have to call them back in, I'm afraid.

MR. KELLY: Yes.

THE COURT: I have a note in which they wish to see the surveillance photographs and mug shots.

They must be educated.

MR. COIRO: Everybody watches TV, Judge.

MR. KELLY: Mrs. Albert said, "Bust photos," didn't she.

THE COURT: That shows she was beyond the time. But the third request, bank employee statements to the FBI man.

Now, I don't know whether --

MR. COIRO: They were not introduced.

THE COURT: That's what I thought. Suppose I just -- suppose I just tell them the, "These not introduced in evidence. Judge Neaher."

MR. COIRO: Fine.

THE COURT: These not in evidence.

MR. COIRO: Fine.

THE COURT: And then send them -- do you want to makr the note? And recover it from them.

THE CLERK: Court Exhibit 3, one jury note.

THE COURT: I'm going to write down on the bottom--

THE CLERK: I will put it on the back.

THE COURT: All right. Okay. I'm going to endorse on the back -- I will put -- so they know, "Okay. Above, not in evidence. Judge Neaher."

All right. How about that?

MR. COIRO: Fine, Judge.

THE COURT: And you all agree with that?

MR. COIRO: Yes, your Honor.

THE COURT: Tell them the note comes back. Give them the photographs. They want all of them, bank surveillance photographs.

They didn't ask for the note. You will note they didn't ask for the note.

MR. COIRO: They will get around to it.

THE COURT: One at a time. All right.

Have you got the yellow note that fell from above?

Take the note back. I am giving them a message so they don't have to come out again.

(Recess taken.)

(Continued on next page)

THE COURT: Now, we have a note, a request.

THE CLERK: One jury note received as Court Exhibit 4.

THE COURT: You fellows will have to get together on what they want in the way of testimony.

Wait a minute. Who is missing?

MR. COIRO: The US Attorney.

MR. KELLY: They are going to bring up the defendant.

THE COURT: Get Mr. Kaplan or Mr. Kirmelman. Either one.

MR. COIRO: What do they want?

THE COURT: They want the testimony of Wisnofsky and subsequent questions of the man who approached the car after bar had emptied.

MR. COIRO: Subsequent questioning?

THE COURT: Of man who approached car after bar had emptied.

Why don't you take the testimony.

MR. COIRO: I have my copy.

THE COURT: Have you got a copy?

MR. KELLY: No.

THE COURT: Do you want to use the Court copy?

MR. KELLY: All right.

THE COURT: Pick out Wisnofsky and maybe you

can all agree on it and call me.

(Recess taken.)

THE COURT: Now, have you agreed?

MR. COIRO: Yes, your Honor.

THE COURT: All right.

MR. COIRO: Mr. Kaplan, Mr. Kelly and myself have agreed that the Court Stenographer will commence his reading at Page 446 and read through to the middle of Page 452, I believe.

MR. KAPLAN: That's correct.

MR. COIRO: And thereupon he would skip to Page 458.

Is that correct?

MR. KAPLAN: Yes.

MR. COIRO: At the beginning of my cross-examination and read down to --

MR. KAPLAN: So sir.

MR. COIRO: Down to, "no sir" and then he --

MR. KAPLAN: Second from the last line on 458.

MR. COIRO: Then he would proceed to Page 477, the redirect examination, and read the first question and answer by Mr. Kimmelman on redirect.

THE COURT: All right. I have no quarrel with that.

MR. KAPLAN: We have a stipulation on the

record as to it being so stipulated by the Government.

MR. KELLY: Yes, so stipulated by Mr. Pravato.

THE COURT: All right, bring them in.

(Whereupon, the jury entered the courtroom.)

THE COURT: Well, members of the jury, the Court has received your note and with the aid of counsel we have agreed on the portions of the transcript which we believe respond to your request.

So Mr. Reporter, will you go ahead and read.

(Whereupon, the Court Reporter read as directed.)

THE COURT: Is that it, ladies and gentlemen?
Is that what you wanted to hear?

THE FOREMAN: Yes, your Honor.

THE COURT: All right.

(Whereupon the jury retired from the courtroom.)

MR. COIRO: Judge, I believe this is the Court's copy.

THE COURT: All right, fine.

(Recess taken.)

THE CLERK: Jury note received as Court Exhibit 5.

THE COURT: All right, you are all here.
All right, bring them in.

(Whereupon, the jury entered the courtroom.)

THE COURT: Now, members of the jury, I am informed you have arrived at a verdict, and, therefore, I request the Clerk to inquire of the Foreman as to what that verdict is.

THE CLERK: Mr. Foreman, how do you find -- will you please stand.

How do you find the defendant Edward Pravato as to Count 1? Guilty or not guilty?

THE FOREMAN: Guilty.

THE CLERK: How do you find the defendant Edward Pravato as to Count 2? Guilty or not guilty?

THE FOREMAN: Yes, guilty.

THE CLERK: How do you find the defendant Salvatore Polisi as to Count 1, guilty or not guilty?

THE FOREMAN: Guilty.

THE CLERK: How do you find the defendant Salvatore Polisi as to Count 2? Guilty or not guilty?

THE FOREMAN: Guilty.

THE CLERK: And so say you all.

THE COURT: Do counsel desire to have the jury polled?

MR. KELLY: Yes.

MR. COIRO: Yes, your Honor.

THE COURT: All right, will the Clerk poll the jury.

THE CLERK: Mr. Foreman, is that your verdict?

THE COURT: You don't have to rise.

THE CLERK: Is that your verdict?

THE COURT: Do you understand?

THE FOREMAN: Yes.

THE CLERK: Is that your verdict?

THE FOREMAN: Yes.

THE CLERK: Juror No. 2 is that your verdict?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3, is that your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, is that your verdict?

JUROR NO. 4: Yes.

THE CLERK: Juror No. 5, is that your verdict?

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6, is that your verdict?

JUROR NO. 6: Yes.

THE CLERK: Juror No. 7, is that your verdict?

JUROR NO. 7: Yes.

THE CLERK: Juror No. 8, is that your verdict?

JUROR NO. 8: Yes.

THE CLERK: Juror No. 9, is that your verdict?

JUROR NO. 9: Yes.

THE CLERK: Juror No. 10, is that your verdict?

JUROR NO. 10: Yes.

THE CLERK: Juror No. 11, is that your verdict?

JUROR NO. 11: Yes.

THE CLERK: Juror No. 12, is that your verdict?

JUROR NO. 12: Yes.

THE CLERK: So say you all.

THE COURT: All right. Members of the jury, I realize that the task you had to perform is never an easy one in any case. I think that I could not let you depart from here without expressing the thanks of the Court and myself personally for the duty you had to discharge and did so.

I observed after very careful observation of the evidence in the case and what certainly appeared to me to be an appropriate and proper period of deliberations. So I excuse you now with my thanks. Good evening.

THE CLERK: You are to return Tuesday morning downstairs in the Central Jury Room.

A JUROR: Any particular time?

THE CLERK: Usual time, 9:30.

(Whereupon, the jury retired from the courtroom.)

THE COURT: Now, are there any motions that anyone wishes to make following the verdict in the case?

MR. KELLY: Could I reserve my motions for the

time of sentencing, Judge.

THE COURT: Yes.

MR. COIRO: I will make the same application, your Honor.

THE COURT: All right. Now, at the present time I think the defendant Polisi is on bail, is he?

MR. KAPLAN: That's correct. Do you know the bail?

MR. COIRO: I think it's \$50,000.

MR. KAPLAN: Surety?

MR. COIRO: Yes.

THE COURT: Surety.

MR. KAPLAN: We have no objection to continuing it.

THE COURT: All right, that will be continued. I know the defendant Pravato --

MR. KELLY: He's in custody.

THE COURT: That's right.

Now, let's see. As you all know it takes about eight weeks for the Court to receive a pre-sentence report in this matter. And so I cannot fix a definite date for sentencing.

MR. COIRO: We have no objection.

THE COURT: But you will get ample notice and opportunity to review the report when it comes.

THE COURT: All right. My decision on that point is that I overruled you because I don't rely on footnotes in the Matlock case. I rely on the statements in the opinion to the effect that there is no requirement that express permission even be given to allow officers to search a room or premises. It is sufficient to show authority in her own right. That is, by reason of her relationship to the premises.

There is no question in my mind that this was Mrs. Syracuse's house. I don't know whether she owned it or rented it. It was her house. And she gave, in effect, the barest license, if you may call it that, based on the testimony here, for this defendant to occupy a room on a temporary basis.

There would be no doubt in my mind that Mrs. Syracuse never intended to evict herself from that room. She occupied the house and every room in it. And all that Pravato was there -- the only basis was that of a bare sufferance. He was allowed to stay there because, according to the testimony,

he has -- had some difficulty with someone he had been staying with, and he wanted to come over there and live for a couple of days.

So on that basis, I -- unless you are saying that you are being denied some opportunity here to cross examine Mrs. Syracuse to bring out that the facts are quite different than what they appear from the testimony of the agent, the FBI agent, who asked if they might search the room in question and got her consent to do it, since it was her house, it seems to me, based on the evidence -- and there is nothing to gain saying that -- I find that it comes within the majority Supreme Court ruling of Matlock, and I say the search was valid.

Now, you have your argument to make to the Court of Appeals if you get there.

MR. COIRO: Yes, your Honor.

THE COURT: And all I can say is that as I said before it will be approximately two months from now.

MR. COIRO: Fine, Judge. And I guess the defendant would have to report to the Probation on Monday.

MR. KAPLAN: Monday morning at 10:00 O'clock would be appropriate.

MR. COIRO: I will have him report downstairs at 10:00 O'clock.

THE COURT: How about Mr. Pravato.

MR. KELLY: Well, I think he should go back to Springfield in the interim. But I think he has to be here at least until next week for a few days.

THE COURT: So he has to be interviewed.

MR. KELLY: Yes. Sure. I suggest he would be brought back on Monday to the Probation Department to be interviewed. I guess the Marshalls could arrange for that.

THE COURT: Right.

MR. KELLY: Thank you very much.

MR. COIRO: Thank you, your Honor.

Certificate of Service

July 11 , 19 74

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

E. Thomas Doyle